

SUPREME COURT, U. S.

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1971

No. 71-11

Supreme Court, U.S.

FILED

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**JAMES R. JAMES, Judicial Administrator,
State of Kansas,
Appellant,**

VS.

**DAVID E. STRANGE,
Appellee.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

BRIEF OF APPELLANT

**MATTHEW J. DOWD
Assistant Attorney General
State House
Topeka, Kansas 66612**

Of Counsel

VERN MILLER

Attorney General

EDWARD G. COLLISTER, JR.

**Assistant Attorney General
Attorneys for Appellant**

**JOHN E. WILKINSON
535 Kansas Avenue
Topeka, Kansas 66603
Attorney for Appellee**

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OPINION BELOW

The opinion of the three-judge district court is set out in the appendix to the jurisdictional statement, A1-A9, and is reported in 323 F. Supp. 1230 (D. Kan. 1971).

JURISDICTION

The opinion of the three-judge court was filed on March 5, 1971. Judgment pursuant to the opinion was entered on April 19, 1971. That judgment declared, *inter alia*, K.S.A. 1971 Supp. 22-4513 unconstitutional and permanently enjoined future enforcement of the statute. Notice of appeal was filed in the United States District Court for the District of Kansas on May 3, 1971. An order noting probable jurisdiction was entered by this Court on December 7, 1971. Appellate jurisdiction is conferred by 28 U.S.C. §§ 1253 and 2101(b).

QUESTION INVOLVED

Whether the existence of a state statutory procedure providing for the collection from an indigent defendant of moneys expended by the state to furnish him counsel, constitutes an unlawful burden upon an indigent defendant's Sixth Amendment right to the assistance of counsel.

STATUTE INVOLVED

K.S.A. 1971 Supp. 22-4513, the validity of which was challenged in the district court reads as follows:

"(a) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by section 10 [62-3110], such defendant shall be liable to the state of Kansas for a sum equal to such expenditure and such sum may be recovered from the defendant by the state of Kansas for the benefit of the fund to aid indigent defendants. Within thirty (30) days after such expenditure, the judicial administrator shall send a notice by certified mail to the person on whose behalf such expenditure was made,

which notice shall state the amount of the expenditure and shall demand that the defendant pay said sum to the state of Kansas for the benefit of the fund to aid indigent defendants within sixty (60) days after receipt of such notice. The notice shall state that such sum became due on the date of the expenditure and the sum demanded will bear interest at six percent (6%) per annum from the due date until paid. Failure to receive any such notice shall not relieve the person to whom it is addressed from the payment of the sum claimed and any interest due thereon.

Should the sum demanded remain unpaid at the expiration of sixty (60) days after mailing the notice, the judicial administrator shall certify an abstract of the total amount of the unpaid demand and interest thereon to the clerk of the district court of the county in which counsel was appointed or the expenditure authorized by the court, and such clerk shall enter the total amount thereof on his judgment docket and said total amount, together with the interest thereon at the rate of six percent (6%) per annum, from the date of the expenditure thereof until paid, shall become a judgment in the same manner and to the same extent as any other judgment under the code of civil procedure and shall become a lien on real estate from and after the time of filing thereof. A transcript of said judgment may be filed in another county and become a lien upon real estate, located in such county, in the same manner as is provided in case of other judgments. Execution, garnishment, or other proceedings in aid of execution may issue within the county, or to any other county, on said judgment in like manner as on judgments under the code of civil procedure. None of the exemptions provided for in the code of civil procedure shall apply to any such judgment, but

no such judgment shall be levied against a homestead. If execution shall not be sued out within five (5) years from the date of the entry of any such judgment, or if five (5) years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant and shall cease to operate as a lien on real estate of the judgment debtor. Such dormant judgment may be revived in like manner as dormant judgments under the code of civil procedure.

(b) Whenever any expenditure has been made from the aid to indigent defendants fund to provide counsel and other defense services to any defendant, as authorized by section 10 [62-3110], a sum equal to such expenditure may be recovered by the state of Kansas for the benefit of the aid to indigent defendants fund from any persons to whom the indigent defendant shall have transferred any of his property without adequate monetary consideration after the commission of the alleged crime, to the extent of the value of such transfer, and such persons are hereby made liable to reimburse the state of Kansas for such expenditures with interest at six percent (6%) per annum. Any action to recover judgment for such expenditures shall be prosecuted by the attorney general, who may require the assistance of the county attorney of the county in which the action is to be filed, and such action shall be governed by the provisions of the code of civil procedure relating to actions for the recovery of money. No action shall be brought against any person under the provisions of this section to recover for sums expended on behalf of an indigent defendant, unless such action shall have been filed within two (2) years after the date of the expenditure from the fund to aid indigent defendants."

STATEMENT OF THE CASE

This case involved a challenge to the constitutionality of a state statute, K.S.A. 1971 Supp. 22-4513, which provided a method whereby the state of Kansas could recover in civil proceedings moneys expended for legal services on behalf of indigent defendants subsequent to the rendition of services. The case was heard by a three-judge court of the District of Kansas upon a stipulated statement of facts, which really were irrelevant to the court's decision, and generally indicated that David Strange was charged with a felony criminal offense in the District Court of Shawnee County, Kansas, on July 2, 1969. (A. 7) Mr. Strange was arrested, brought before the magistrate court for arraignment, advised of his right to counsel, subsequently found indigent, provided appointed counsel pursuant to state law, entered a plea of guilty to a reduced charge, and placed on probation by the District Court of Shawnee County, Kansas. (A. 7, 9, 10)

Pursuant to state statute, the procedure for payment of the attorney's services commenced. Vouchers were submitted to the judicial administrator of the state of Kansas pursuant to the Kansas Aid to Indigent Defendants Act. (Mr. James at all times relevant to this lawsuit has been judicial administrator of the state of Kansas and responsible for administrative enforcement of the Aid to Indigent Defendants Act.) Mr. Strange's court-appointed counsel was paid \$500. (A. 11) Subsequently, pursuant to K.S.A. 1971 Supp. 22-4513, the judicial administrator sent notice by certified mail requesting payment of the sum of \$500 to Mr. Strange. The administrative procedure concerning reimbursement to the state did not proceed any further because a temporary restraining order, later replaced by a temporary injunction, was entered by the Court prohibiting the judicial administrator from proceeding further.

That injunction was made permanent by the three-judge court's decision reflected in the Journal Entry of Judgement of April 19, 1971. (A. 14-15) The Court concluded that the provisions of K.S.A. 1971 Supp. 22-4513 unnecessarily and needlessly burdened an indigent's federal constitutional right to counsel guaranteed by the Sixth and Fourteenth Amendments and therefore declared the state statute unconstitutional enjoining its future enforcement. This appeal followed.

ARGUMENT AND AUTHORITIES

A State May Constitutionally Provide for Recoupment from an Indigent Defendant of Monies Expended by the State to Furnish Appointed Counsel to the Indigent

This appeal involves the constitutionality of a portion of the Kansas "Aid to Indigent Defendants Act" enacted by the 1969 Session of the Kansas Legislature. The challenged portion of the Act, K.S.A. 1971 Supp. 22-4513, allows the state of Kansas to recover costs incurred in providing counsel and other services to indigent defendants, from those defendants subsequent to the expenditure. The statute authorizes, *inter alia*, the following:

1. The state may take a judgment in the same manner and to the same extent as any judgment under the Code of Civil Procedure (22-4513 (a)).
2. The judgment becomes a lien on any real estate after its existence (22-4513 (a)).
3. Execution, garnishment or other proceedings in aid of execution may be utilized to enforce the judgment as in any judgment under the civil procedure code (22-4513 (a)).

The statute also limits the real estate liens by recognizing the homestead exemption. The statute provides that the

judgment will become dormant in five (5) years if execution is not issued. For all practical purposes the methods available for enforcement of the judgment are the same as those provided by the Code of Civil Procedures or any other civil judgment. See K.S.A. 1971 Supp. 60-701-724, 60-2401-2419.

The statute also provides that a recovery may be had against persons to whom the indigent defendant has transferred property subsequent to the commission of a crime without adequate monetary consideration, to the extent of the value of such transfer (22-4513 (b)). Such an action must be brought within two (2) years after expenditure from the fund.

The three-judge court declared the statute unconstitutional on its face, after reaching conclusions that under no possible factual situation, nor under any possible interpretation of the statute, could it be found constitutional. The basis of the three-judge court's decision was that any construction,

"... of the Kansas statute which leaves intact the state's right to recover legal expenses from indigents is a construction which inevitably impinges upon and undermines the rights protected in *Gideon*." *Strange v. James*, 323 F. Supp. 1230, 1234 (D. Kan. 1971), jurisdictional statement, A. 7.

The breadth of the three-judge court's decision requires a conclusion that any statute, or any interpretation of this particular statute, which allows the state of Kansas under any circumstances to recover legal expenses from indigents unconstitutionally impairs the right to counsel.

The historical background of Kansas right to counsel law is illuminating. The legislature of the state of Kansas has for many years been concerned with, and attempted

to protect, rights granted by the Sixth Amendment to the Federal Constitution. Since 1868, there have been statutory provisions in Kansas requiring the state to provide counsel in some criminal cases for those who are financially unable to secure counsel of their own choosing. See Kan. G. S. 1868, Ch. 82, § 160; R.S. 1923, § 62-1304; L. 1941, Ch. 291, Sec. 1; Kan. G. S. 1949, Sec. 62-1304. With the increase in the volume of criminal cases, and the expansion of the stages of the criminal prosecution to which the right to counsel applied, the legislature codified a detailed procedure to be followed for appointment and use of attorneys in indigent cases in 1969. The statutory scheme adopted by the 1969 legislature provided for systematic compensation of the attorneys who are appointed in indigent cases (K.S.A. 1970 Supp. 22-4507), both at the trial and appellate level, as well as for compensation paid on behalf of the indigent defendants for procedural necessities such as transcripts and court documents (K.S.A. 1971 Supp. 22-4505, 4506, 4509), or such assistance as that provided by expert witnesses or investigators (K.S.A. 1971 Supp. 22-4508). Legislative guidelines established a procedure for determining the indigency of any defendant who stood before a Kansas court. The legislation also set up guidelines for the expenditure for funds for attorney's fees in appointment cases. A board of supervisors, including as members the state judicial administrator and a representative of the state supreme court, was established to review schedules for fee payment and approval of individual expense items. See K.S.A. 1971 Supp. 22-4514. In addition, the challenged portion of the legislation authorized the state to attempt to collect expenditures from those on whose behalf the expenditure was made subsequent to the time the expenditure was made.

The state of Kansas, not unlike many other states, has in the past five years been suffering severe revenue

problems. As a result of revenue concern, provision for recovery of expenditures was included in the Indigent Defendants Act. The money problems with respect to court-appointed attorneys is reflected in appropriations made over the last three years. In 1969, the Legislature appropriated \$376,500 to fund the Aid to Indigent Defendants Fund. L. 1969, Ch. 46, Sec. 13. The 1970 appropriation totaled \$350,000. L. 1970, Ch. 25, Sec. 4, Ch. 44, Sec. 3. By 1971, when use of the Fund became extensive, the inadequacy of the previous funding was obvious. It was necessary for the 1971 legislature to make a supplemental appropriation of \$275,000.00 for fiscal year 1970. L. 1971, Ch. 12, Sec. 54(a). For fiscal 1972, the judicial administrator requested that his total 1971 budget (\$570,000) be increased to \$612,000. However, the Legislature appropriated less money, after a serious attempt to do away with the funding program entirely. Ultimately, \$400,000 was appropriated for fiscal 1971 to fund the program. L. 1971, Ch. 13, Sec. 52(a); see also L. 1971, H.J. 715, S.J. 569.

During fiscal 1970, the judicial administrator expended almost all of the original appropriation. In fiscal 1971, both the original and supplemental appropriations were expended. The result currently is that the judicial administrator has had to reduce on a pro rata basis payments made to attorneys in view of the reduced appropriations. Currently, the Board of Supervisors of the Indigent fund has set compensable services at the value of \$15 an hour for out-of-court time and \$20 an hour for in-court time for attorney's fees compensable under the Act. This figure is roughly fifty to sixty percent of recommended minimum fee charges in the metropolitan areas in Kansas and slightly below the recommended minimum fee schedules in the rural areas. The figures are also roughly fifty percent of the payment schedule currently used in the federal court for appointed counsel. Thus, in many cases,

the value of the same services as far as monetary exchange is concerned is lower in appointment cases, than it would be if the attorney is retained. In Kansas there is also a maximum limitation of \$500 on the amount payable in any case not involving a class A felony. Class A felony cases are those where possible punishment is either death or life imprisonment. There is a maximum limitation of \$6,000 per case for defense in class A felony cases.

Through fiscal years 1970 and 1971, approximately \$17,000 has been recovered by use of the challenged statute. Since the state is currently enjoined from utilizing the recovery procedures, there has been little or no follow up action to enforce the provisions of the statute during the entirety of its existence.

A survey of other jurisdictions, including the federal system, discloses the reimbursement provision of the Kansas law neither unique, nor unusual. Ala. Code, Title 17, § 318(12) (1969 Supp.); Alaska Stat. Ann. 1962 § 12.55-020; Fla. Stat. Ann. § 27.56 (1971 Supp.); Hawaii Rev. Stat. § 611-6 (1970 Supp.); Idaho Code Ann. § 19-858 (1971 Supp.); Ind. Ann. Stat. 1956, 9-3501 (1971 Supp.); Iowa Code Ann. § 775.5 (1971 Supp.); Md. Code 1966, Art. 26, § 9; N.H. Rev. Stat. Ann. 604-A:9 (1971 Supp.); N.D. C.C., § 29-07-01.1; N.M. Stat. Ann., 1953, § 41-22-7; Ohio R.C. § 2941-51 (1970 Supp.); Ore. Rev. Stat. § 137.205; S.C. Code 1962, § 17-283 (1971 Supp.); 2 Tex. C.C.P., Art. 26.05 §§ 3, 5; Tex. C.C.P., Art. 1018; Va. Code Ann. § 14.1-184 (1971 Supp.); W. Va. Code Ann. (1955) § 6190; 29 Wis. Stat. Ann. § 256.66. See also 18 U.S.C. Section 3006 A (f).

The sole issue presented is whether or not the State of Kansas may, if its Legislature so decides, enact a statute providing a procedure for collection of expenses, including attorney's fees, from those persons determined indigent on whose behalf such funds were provided. The

problem presented by this case has not been previously considered by this Court.

The only case in which comments on this issue appear is *Rinaldi v. Yeager*, 384 U.S. 305 (1966). In the Court's opinion, Mr. Justice Stewart noted:

"We may assume the state can validly provide for recoupment of the cost of appeals from those who later become financially able to pay." l.c. 311.

Mr. Justice Harlan added in a dissenting opinion:

"I find no substance to appellant's main argument, which the court lays aside, that to permit any such recoupment from an indigent is an unconstitutional deterrent to appeal. Nor do I think there is any force to the argument in N.4 (ante, P. 580), not even suggested by appellant, which at best goes to the validity of the statutes governing compensation and not to the reimbursement statute being reviewed." l.c. 311.

However, the issue in *Rinaldi* was whether or not a distinction in recoupment could constitutionally exist between those defendants subsequently incarcerated (who were required to reimburse the state), and those who were released from confinement (who were not required to reimburse the state). The New Jersey approach in *Rinaldi* violated the equal protection clause. l.c. 310-311.

Other authority on this subject is virtually non-existent. There are no federal district nor circuit court decisions in point, or even relevant. There are four state court decisions from different courts, several not directly in point, and the others commenting in dicta on the issue. The Ohio Court of Appeals noted that a provision of the Ohio code which made a defendant liable for the cost of appointed counsel, enabled the state to make such

costs a part of a civil judgment which could be collected with normal civil remedies for enforcement of civil judgments. *Ex parte Wilson*, 36 App. 2d 854, 183 N.E.2d 625 (1962). The Iowa Supreme Court has observed in *dictum*:

"It would be constitutionally permissible for the Legislature to include a provision that expenditures made under this section [Section 775.5, providing payment of certain enumerated expenses to those serving an indigent defendant] be taxed as part of the cost against a defendant convicted either as a result of jury trial or plea of guilty." *Woodbury County v. Anderson*, 164 N.W.2d 129, 133-34 (Iowa, 1969).

The New Hampshire Supreme Court in an advisory opinion concluded that a state provision requiring some reimbursement by the indigent defendant on whose behalf sums were expended for attorney's fees violated a state constitutional provision which provided that a person "shall have the right to counsel at the expense of the state as need is shown . . .". *Opinion of the Justices*, 256 A.2d 500, 502 (N.H. 1969). The California Supreme Court has held that the state may not impose a condition that the defendant reimburse the county for legal fees expended on his behalf when granting probation. *In re Allen*, 78 Cal. Rptr. 207, 455 P.2d 143, 144 (1969). Cf., *Davis v. Ziem*, 383 Mich. 717, 178 N.W.2d 920, 922 (1970). Our research has revealed no other relevant authority.

In many ways, the issue presented is difficult to confront in a precise manner. It is easy enough to say that the Federal Constitution guarantees the right to counsel in criminal actions in state courts. It is much more difficult to define in particular instances what the "right to counsel" is. That is the problem we face here. The three-judge court predicated its holding on several broad conclusions. First, the Court noted that:

"Any construction of the Kansas statute which leaves intact the state's right to recover legal expenses from indigents is a construction which inevitably impinges upon and undermines the rights protected in *Gideon*." l.c. 1234, Jurisdictional Statement, A. 7.

The Court went further and applied its conclusion to any method by which the state might attempt to recoup legal expenses.

"Consequently, we believe that the inevitable effect of the Kansas statute which in any wise seeks to recover defense costs from indigents is to unconstitutionally burden and suppress the exercise of the constitutional right to counsel." l.c. 1234, Jurisdictional Statement, A. 8.

The Court also observed that the challenged portion of the Kansas Indigent Act is unnecessary and therefore excessive. l.c. 1233, Jurisdictional Statement, A. 6.

We therefore have several rather significant concepts to delineate in reaching a solution to the problem presented. When we use the phrase "right to counsel" precisely what is it that we mean the Constitution guarantees. Does the Constitution guarantee that a man will not be tried in a criminal case without the opportunity of representation by counsel regardless of his current financial situation? Does the Constitution require that the state provide *free counsel* to every indigent accused of a crime regardless of his subsequent ability to reimburse the state for expenses paid on his behalf? Or, does the Constitution require that every defendant accused of a crime have an absolutely unlimited right to any and all defense services?

We are mindful of the various pronouncements concerning the nature of the right to counsel and its sig-

nificance. We only refer to the words of Mr. Justice Black in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

"From the very beginning, our State and National constitutions and laws have laid great emphasis on procedural and substance of safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if a poor man charged with a crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*: 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' " 1.c. 344-345.

The import of *Gideon* as well as such right to counsel and/or equal protection cases as *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963), is that a man's financial situation at the time he stands charged with a crime should not cause him to lose substantive or procedural requisites of a fair trial. Thus, the fact that an accused was poor and could not afford a lawyer at a criminal trial required some affirmative action on behalf of the prosecuting sovereign to provide counsel on the accused's behalf. *Gideon, supra*. The same could be said for the processing of an appeal. Not only must the prosecuting sovereign provide counsel for the appeal, but all the necessary ingredients to make any appeal taken as a matter of right available to the same degree as it is available to those who are able to afford it. *Douglas, supra; Griffin, supra*.

It is significant, however, that the indigent accused's financial situation should not create additional rights, that is rights that would not be in existence if the accused

could not qualify as an indigent. We are not aware of any decision which holds that the indigency determination for right to counsel confers rights not held by the non-indigent, that is absolute economic or financial non-responsibility. The trial court's opinion operates to confer such rights. Such an effect is not required by the Constitution, nor should it be required.

What the Constitution does require is that the State provide an accused with an opportunity to be heard by counsel. The State is required, in other words, to negate any prohibitive situation created by the accused's current financial status. Regardless whether the statute providing for appointment of counsel after an accused qualifies as an indigent might also provide a method by which this State could seek recoupment, the opportunity to be heard by counsel exists. As a matter of fact, the situation that exists under the Kansas statute places the accused in a more analogous situation vis-a-vis non-indigent defendant, than does the concept that the State ought to be required to provide absolutely free counsel with no economic consequences.

In addition to consideration of the nature of the right to counsel, other questions inevitably arise. What is a condition upon the exercise of the constitutional right to counsel? Is it not a condition upon the exercise of that right that the indigent has no choice in selecting the counsel who will represent him? Is it not a condition upon the exercise of that right that court-appointed counsel in individual cases might be attorneys who have little or no experience in criminal cases, or little or no experience at all? It would seem that knowledge on the part of those accused of crimes that they were likely to get the inexperienced lawyer appointed to represent them would be a condition on the free exercise of the right to counsel.

If we were to conclude that authorization for the state to recover legal expenses in a civil action, with civil remedies, is a condition on the exercise of the constitutional right to counsel, it must be because we also conclude that somebody who is poor will not wish to have that civil proceeding exist. Or, the condition or burden will exist because of the man's economic status. And yet, if we are willing to make that conclusion, what do we think of those citizens who are accused of crimes who do not qualify under the Indigency statute, and yet do not have enough means to readily employ any attorney they wish, that is the most experienced and expensive, to defend them in criminal cases. Does not their economic status, even though they are not indigent, condition the exercise of their right to counsel. Obviously it does.

Although an indigent accused does have the right to counsel, the exercise of that right is as a matter of fact conditioned upon many factors, and is in its exercise affected by many considerations. The three judge court found fault with the Kansas statute because knowledge of the recoupment provisions of the Kansas statute might lead an accused to refuse to exercise the right to counsel. Of course, an equally valid assumption is that anyone qualifying under the indigent statute would really not care whether a civil judgment could be taken, because he would have no property against which that judgment might be enforced. In any event, the assumption made by the three judge court is speculation. If a problem of that nature would arise in any individual case, it would be the responsibility of the appointing judge to insure that the defendant's rights are protected. That situation was never reached in the current case. The record is absolutely clear that appellee's exercise of his right to counsel was not in any way affected by the existence of the reimbursement provision. (A. 10-11)

In practice there are many conditions on the exercise of the right to counsel. The indigent has to take the attorney who is appointed. The indigent may be represented by an inexperienced lawyer. The appointed lawyer may not have the same supportive resources available as would the retained lawyer.

The trial court found the Kansas statute constituted an unconstitutional condition upon the exercise of the right to counsel. That the statute places a condition upon the use of appointed counsel is true. But, the mere existence of the condition does not mean that an unconstitutional burden is placed on the exercise of a constitutional right. If the trial court's reasoning is correct, the entire system of representation by counsel in criminal cases places unconstitutional burdens on the exercise of a constitutional right. Further, if a provision allowing reimbursement of legal expenses is an unconstitutional condition on the exercise of a constitutional right, then the same reasoning would require a conclusion that allowing judgment for costs against convicted defendants (*E.g.*, Ark. Stat. Ann., §§ 43-2316, 2403, 2404, 2405; Colo. Rev. Stat., §§ 39-10-5, 39-10-6; Del. Code Ann., Title 11, § 4101) unconstitutionally burdens the exercise of the right to a jury trial.

Neither the right to counsel, or any other constitutional right, exists in a vacuum. The test therefore must be whether the condition needlessly burdens the exercise of a constitutional right. *United States v. Jackson*, 390 U.S. 570, 582-83. (1968) In *Jackson*, portions of the federal kidnapping statute were challenged. The statute provided that if trial were had to a court, or if a plea of guilty were made by the defendant, the maximum penalty would be life imprisonment. However, the same statute for the same crime provided that if the jury determined guilt, the maximum penalty could be death. There was no rational reason for distinction between the types of penalties. The distinction that existed was not re-

lated in any rational way to the evil protected against. Such is not the case here. The condition is related to the concept of State appointed counsel, and particularly to the problem of funding such a program. The challenged statute is rationally related to the end of attempting to raise money to help defray the costs of providing appointed counsel. The fact that there may be other forms of achieving the same results, or that one viewing the statute might doubt its wisdom, is not germane. The reimbursement provisions are rationally related to the problem of funding court appointed counsel programs.

The situation presented with this statute is dissimilar from the situation facing this court in the *United States v. Robel*, 389 U.S. 258 (1968). There, an employee of the government had a choice of foregoing a constitutional right and retaining his job, or losing his job. Again, the crux of the Court's decision had to be that the condition placed upon the exercise of a constitutional right was not, in its enacted form, relevant to the evil to which the statute was directed, a situation not true in our case.

The three judge court then held that the statute allowing reimbursement, in any way, at any time, was a needless and unnecessary condition on the exercise of the right to counsel. Is it necessary that the State of Kansas be allowed to seek to reimburse its State Treasury for expenses spent for appointed counsel? The Legislature of the State of Kansas apparently thinks so, because it enacted such a procedure. It is the responsibility of the Kansas Legislature to determine what is and is not necessary with regard to the expenditure of public funds from the Kansas Treasury. Apparently the Legislature believes the provision necessary. To believe otherwise would require the conclusion that the Legislature enacted a scheme for recoupment of expenses that requires performance of services and expenditure of time and effort on behalf of State officials for no observable purpose. Why would the

Legislature have made that commitment on the part of the State had not it also made a legislative determination of the need of the reimbursement provisions.

The trial Court also concluded that the reimbursement provisions were needless. The Court observed that it was useless to require an *indigent* to repay monies expended. If the defendant is indeed indigent after payments are made from the Indigent Defendants fund, and remains indigent for five (5) years, then use of the statute has not accomplished anything. However, if the defendant did own property that he conveyed to someone else after the commission of a crime, or if the defendant does have financial resources within five (5) years after expenditures are made on his behalf, then the statute is certainly not useless. The blanket conclusion that the statute is needless or useless is not valid. Without having an opportunity to use much enforcement due to the statute's short lived tenure, approximately \$17,000.00 was recouped by the State. Not much relative to total expenditures, but a significant sum of money.

CONCLUSION

The Legislature of the State of Kansas has made a determination that attempting to recoup expenditures for legal services from those declared indigent during criminal proceedings is a desirable and necessary portion of the State's attempt to provide defense services to indigent defendants. We must assume that the Legislature was aware that the program enacted would require time and effort on the part of State Officials, and even considering that expenditure and the probability that in some cases no recovery or reimbursement could be had, still felt the objective of reimbursing the state treasury was a necessary portion of the legislative enactment. We submit that an unconstitutional condition or burden is not placed on the

exercise of a constitutional right when that condition requires that the indigent defendant be placed in the same circumstances as any other defendant with regard to exercising responsibility for compensation of defense counsel. We submit that the three judge court erred when it concluded that any attempt on the part of the State of Kansas to in any way attempt to recover monies expended for legal services from an indigent defendant is unnecessary or needless. We submit that the three judge court erred when it held, as it must have, that the State of Kansas cannot attempt to recover or recoup expenses for legal services from those who fraudulently use the provisions of the aid to indigent defendants act. We submit that the three judge court erred when it concluded, as it must have, that the State of Kansas could not constitutionally attempt to recoup expenditures for legal services from those who are at one time indigent, thus qualifying for State assistance, but who later are financially able to reimburse the state for the expenditures made. We submit that the three judge court erred when it determined that the reimbursement provisions of K.S.A. 1971 Supp. 22-4513 were unconstitutional on their face, and therefore restrained further enforcement of the provisions of that act. The decision of the three judge court should be reversed with directions to enter judgment for defendant-appellant.

Respectfully submitted,

MATTHEW J. DOWD
Assistant Attorney General
State of Kansas

Of Counsel

VERN MILLER
Attorney General of the State
of Kansas

EDWARD G. COLLISTER, JR.
Assistant Attorney General